UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVA EXECUTIVE LIMOUSINE, INC.
AND DIVA LIMOUSINE, LTD

and Case 22-CA-091561

DAVID ABRAMS

ORDER[1]

The Respondent's Motion for Summary Judgment is denied. The Respondent has failed to establish that it is entitled to judgment as a matter of law on the legal issue presented and has further failed to establish that there are no genuine issues of material fact warranting a hearing regarding the complaint allegations.

Dated, Washington, D.C., September 30, 2014.

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

MEMBER MISCIMARRA, dissenting.

I respectfully dissent from my colleagues' denial of the Respondent's motion for summary judgment because I believe the record presently before us suggests there are no questions of material fact that warrant a hearing. For present purposes, I do not pass on the merits of the Respondent's defense that the Board must find that the Respondent's class waiver agreement is lawful in view of the United States Court of Appeals for the Fifth Circuit's decision in *D. R. Horton, Inc., v. NLRB*, 737 F. 3d 344 (5th Cir. 2013), denying enforcement to *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), nor do I pass on the merits of the General Counsel's position that this case should still be controlled by the Board's broad invalidation of class waiver agreements in *D.R. Horton*.

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

As I view the record, the Respondent's motion for summary judgment appears to establish there are no disputed issues of material fact. Nor does the General Counsel identify any disputed issues of material fact that warrant a hearing.[2] Thus, I believe the Respondent's motion establishes that resolution of this case may be appropriate by way of summary judgment, without a hearing, and this has not been effectively rebutted by the General Counsel. Such a procedural question – which involves whether a hearing is warranted – is independent of whether the Board will rule for or against the Respondent on the merits.

Accordingly, under Section 102.24(b) of the Board's Rules and Regulations, I would issue an order to the Respondent and the General Counsel (i) directing them within 30 days after the date of the order to show cause why this case should not be resolved by way of summary judgment, without a hearing, and (ii) permitting them within the same 30-day period to submit whatever supplemental briefs they deem appropriate regarding the merits of any potential Board ruling on summary judgment. I believe this approach is consistent with the Board's Rules and Regulations, and it is preferable where, as here, the parties may agree there are no disputed questions of material fact, notwithstanding their disagreement regarding who should prevail on the merits.

Dated, Washington, D.C., September 30, 2014.

PHILIP A. MISCIMARRA, MEMBER

[2] Although the General Counsel obviously opposes the entry of judgment in favor of the Respondent, there appears to be no dispute that the Respondent required all employees to agree that all employment-related disputes would be resolved in arbitration without any class, collective or joinder actions. The Respondent's class waiver agreement appears similar, in all material respects, to the agreement found unlawful in the Board's *D. R. Horton* decision. Finally, the record appears to establish that the employee in question here (Don Bricker) was unable to work for the Respondent unless and until he signed the agreement. The sole issue, therefore, appears to be the legal question of whether the class waiver and related provisions in the Respondent's mandatory arbitration agreement violate Sec. 8(a)(1) of the Act.